

D.P.U. 88-DS-11

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by Fiore & Zenone, Inc.

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APPEARANCE: David J. Hopwood, Esq.  
Heafitz & Hopwood  
31 Channing Street  
Newton, Massachusetts 02158  
FOR: FIORE & ZENONE  
Respondent

Robert Smallcomb  
Division of Pipeline Engineering and Safety  
Department of Public Utilities  
100 Cambridge Street  
Boston, Massachusetts 02202  
FOR: THE DIVISION OF PIPELINE ENGINEERING  
AND SAFETY

## I. INTRODUCTION

On June 29, 1988, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to Fiore & Zenone ("Respondent"). The NOPV stated that the Division had reason to believe that the Respondent performed excavations at 132 Hampshire Road, Methuen, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to an underground pipe operated by Bay State Gas Company ("Bay State" or "Company"), and also failed to notify the Company after the damage had occurred.

On August 1, 1988, an informal conference was held at the Department. In a letter dated September 30, 1988, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of its right to request an adjudicatory hearing. In that decision, the Division found that the Respondent had violated the Dig-Safe Law because "[i]t was highly improbable that backfilling or overload or mechanical stress would have caused [the relevant] damage if the backfill had been properly placed." The Division also stated that the Company was informed of the damage by a customer who complained of a "gas odor" and not by the Respondent.

On October 7, 1988 the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on January 26, 1989 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. Robert Smallcomb, a public utilities engineer with the Department, represented the Division. David DiFrancesco, a distribution operator for Bay State, testified for the Division. The Division

presented six exhibits. David Hopwood, Esquire, represented the Respondent. Testifying for the Respondent was James Zenone, president of Fiore & Zenone. The Respondent presented one exhibit. The Department moved all exhibits into evidence.

## II. SUMMARY OF FACTS

### A. The Division's Position

The Division alleged that the Respondent failed to take reasonable precautions to protect underground facilities during its excavation at 132 Hampshire Road in Methuen, Massachusetts (Exh. D-1). Mr. Smallcomb stated that the Respondent was looking for a one or two-inch service line with a 98,000 pound backhoe when it broke the facility (Tr. at 55). He also stated that the operator was unlicensed to excavate (id. at 26).<sup>1</sup> Mr. Smallcomb further stated that by excavating to the depth of one foot, the Respondent's action conformed to the Department's definition of excavating (id. at 29-30).

Mr. DiFrancesco testified that the customer residing at 132 Hampshire Street contacted the Company to report the odor of gas (id. at 12-13). He also testified that on May 26, 1988, in response to the customer's call, he was instructed by the Company to investigate the odor of gas at 132 Hampshire Street in Methuen (id. at 11). Mr. DiFrancesco stated that when he arrived at the site, there was a strong smell of gas in the air above the freshly dug trench, and readings of 100 percent gas in the air were indicated by his combustible gas indicator in the immediate area (id. at 12). Mr. DiFrancesco further testified that the operator for the Respondent had admitted

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<sup>1</sup> The Department made a bench request for information corroborating this statement. The information was never received by the Department.

to damaging the main with a backhoe and not contacting the Company to report the damage (id. at 15, 16, 25).

B. The Respondent's Position

Mr. Zenone stated that he may have been on the site during the day when the damage occurred, and although he did not remember the specific incident, he generally knew the type of work that was being performed (id. at 27). Mr. Zenone testified that the Respondent was stripping the top foot of fill off the road to create space to insert gravel when the accident occurred (id. at 28). He asserted that the Respondent did not consider stripping to be excavation (id. at 34, 37).<sup>2</sup>

Mr. Zenone admitted that the operator had probably damaged the underground facility without realizing it (id. at 28, 33). He further contended that the operator probably did not "feel" any resistance [such as a breaking line might make] while he was stripping at the site (id. at 35; Exh. F-1). Mr. Zenone testified that the machine that was used to strip the top foot of soil weighed 100,000 pounds and was too large to enable the operator to "feel" an encounter with a line while excavating (Tr. at 35). The Respondent alleged that since the

operator of the backhoe was not aware that he had damaged an underground facility, he did not

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<sup>2</sup> The Department's regulations at 220 C.M.R. 99.02 define "excavation" as "the movement or removal of earth, rock, ledge or other materials in the ground to form a cavity, hole, hollow or passage therein. It shall include, but not be limited to digging; trenching; grading; scooping; ...; backfilling...." We note that "stripping" is similar to grading, and therefore, falls within the definition set forth in the regulations. See Industrial Contractors and Developers, D.P.U. 86-DS-25 (1988); John Farmer, D.P.U. 86-DS-102 (1987).

inform the Company (id. at 57-58).

Mr. Zenone stated that the Respondent could not have anticipated hitting a gas service within the top foot of fill because the service was located at a depth which was too shallow (id. at 28). Mr. Zenone maintained that he had only encountered underground facilities within twelve inches of the surface when rocks and other factors made it difficult for companies to locate their facilities at a depth of three feet (id. at 32). He stated that in the instant excavation, no large rocks or ledges existed that might have caused the Company to locate their services at a more shallow depth (id.).

Mr. Zenone contended that upon smelling gas, the Respondent's superintendent contacted the Company immediately (id. at 29, 33-34, 38). He stated that the Respondent's superintendent and operator had moved 200 feet away from the damage before they smelled gas (id. at 33; Exh. F-1). The Respondent presented a statement, signed by the Respondent's superintendent, that confirmed this contention (Exh. F-1). Mr. Zenone also stated that there was no evidence of damage immediately after the break occurred (Tr. at 29). He contended that the Respondent's employees did not notice the smell of gas earlier because gravel was being back-filled into the trench immediately after the original fill was removed by the operator (Tr. at 33). He also contended that the customer probably contacted the Company first because the customer was closer to the area which was damaged than the Respondent and smelled the gas odor first (id. at 33-34, 38).

### III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires or conduits in use under the surface of said public way...including, but not limited to, any substantial weakening or structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in the Dig-Safe area. Several recent cases have established the proposition that using a machine to expose utilities, rather than hand-digging, constitutes a failure to exercise reasonable precautions. See Petricca Construction Company, D.P.U. 88-DS-31 (1990). John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, D.P.U. 89-DS-116, at 9 (1993); Fed. Corp., D.P.U. 91-DS-2, at 5-6 (1992). In addition, the mere fact that a facility was damaged during an excavation does not by itself constitute a violation of the statute. Yukna v. Boston Gas Company, 1 Mass. App. Ct. 62 (1973). In specific instances where there has been an allegation of failure to exercise reasonable precaution without demonstrating any precautions the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro and Sons Construction Company, D.P.U.

91-DS-4 (1992); Fed. Corp., D.P.U. 91-DS-2 (1992); Albanese Brothers, Inc., D.P.U. 88-AD-7 (1990).

In regard to notification for damage, G.L. c. 82, § 40 also states in pertinent part:

When any damage to any such pipe, main, wire or conduit or its protective coating occurs, the public utility company, natural gas pipeline company, cable television company or municipal utility department shall be notified immediately by the person or public agency responsible for the excavation causing the damage.

The Dig-Safe Law requires that the person responsible for an excavation that caused damage to an underground facility must notify the owner of such damage immediately after the incident has occurred. Mario Suzi & Sons, Inc., D.P.U. 87-DS-86 (1991); A.A. Will Corp., D.P.U. 86-DS-145 (1990). In D.P.U 86-76, this type of violation was termed "a grievous offense since an omission of responsibility in this area could spark an incident at some future time." D.P.U. 86-76, at 13 (1986). While Department orders have not established a clear definition of "immediately," it would appear to be subject to strict interpretation in order to ensure that all parties adhere to the requirements of the Dig-Safe statutory framework. See Heavey Construction and Management Co., D.P.U. 90-DS-3 (1991).

#### IV. ANALYSIS AND FINDINGS

The issues to be decided in this case are: (1) whether the Respondent violated the Dig-Safe Law by failing to contact the Company immediately after causing damage to an underground facility; and (2) whether the Respondent violated the Dig-Safe Law by failing to exercise reasonable precautions to avoid damage to underground facilities.

With respect to the first issue, the Respondent presented evidence indicating that the

Respondent's superintendent had called the Company to report the odor of gas, although Mr. Zenone admitted that that call may have occurred after a customer reported it. The Respondent's superintendent called the Company when he first smelled gas, after he and the operator were approximately 200 feet past the area where the damage occurred. Although the operator did not contact the Company, evidence was presented that the operator was unaware that the Company's facility was damaged, until the moment that he and the superintendent smelled the gas.

In most instances, damage to an underground facility and the discovery of that damage will be instantaneous. Based on the evidence presented, that was not the case here. Due to the nature of the excavation and immediate back-filling, the Respondent was 200 feet away from the location of the damage when it determined that damage had occurred. It was impossible for the Respondent to have called the Company to report damage before it had discovered the damage itself. Accordingly, the Department finds that the Respondent did not violate the Dig-Safe Law by failing to contact the Company "immediately" after damaging underground facilities.

The second issue involves whether the Respondent took reasonable precautions to protect underground facilities. The Division's contention is that damage occurred and therefore, the Respondent failed to exercise reasonable precautions. However, the Division failed to provide examples of precautions which the Respondent might have or could have taken to protect underground facilities.

In specific instances where there has been an allegation without demonstrating any precautions that could or should have been taken, the Department has found that the mere act of damage will not be sufficient to constitute a violation of the statute. See New England



Excavating, supra; Umbro, supra; Fed. Corp., supra; Albanese Brothers, supra. Adequate support or evidence must accompany any allegation that an excavator failed to exercise reasonable precautions in order for the Department to justly construct a case against the alleged violator.

Fed. Corp., supra.<sup>3</sup> The Division did not adequately demonstrate that the Respondent failed to exercise reasonable precautions when excavating at the locus. Accordingly, the Department finds that the Respondent did not fail to exercise reasonable precautions in excavating at 132 Hampshire Road, Methuen on May 26, 1988.

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<sup>3</sup> The Superior Judicial Court may set aside a decision as prejudiced for further action when that decision is "(e) Unsupported by substantial evidence; or (f) Unwarranted by facts found ... on the record." Substantial evidence is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion. G.L. c. 30A, §§ 1(6), 14(7). See New England Excavating, supra at 8.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That Fiore and Zenone, Inc. did not fail to contact the Company to report damage or fail to use reasonable precautions while excavating on 132 Hampshire Road, in Methuen, on May 26, 1988.

ORDERED: That the NOPV issued against the Respondent is hereby Dismissed.

By Order of the Department,